

Robert Cavalier: Why post-Dobbs America will vote pro-choice

ROBERT CAVALIER

AUG 19, 2022

12:00 AM

The Supreme Court's Dobbs decision overturned Roe and returned the issue of abortion to the states and their legislatures. It also led to the initially surprising results of the Kansas referendum on whether to keep the state's constitutional right to abortion or to overturn it and return the issue to the legislature.

The voice of Kansas citizens was 59 to 41 in favor of securing abortion rights. Not even close and in a Red state nonetheless. What path led to that result and what can we learn from this?

First off, the Dobbs decision was the result of a decades long multi-pronged strategy to challenge Roe through the appointments of judges critical of the foundations of the Roe argument and through the election of pro-life state representatives who sought ways to limit the implementation of Roe.

The Dobbs decision found that Roe failed to account for the traditions and values of our nation's history (a historical account that has been disputed) and the fact that abortion, much less the right to abortion, cannot be found in and thereby justified by the text of the Constitution, specifically the 14th Amendment's liberty clause.

Because of these failures, the majority declared the Roe decision "egregiously wrong" and overruled it as precedent. They also noted that Roe can be read more like legislation and so "it must be returned to the legislative bodies that are duly elected by the people."

The dissent implicitly criticizes this judicial philosophy of "textualism" by pointing out the problems of limiting our judicial reasoning to texts without context. "The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the

specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning.”

In reading the dissent, one is struck by the attention to the realities that confront women and their lives as women. “Human bodies care little for hopes and plans. Events can occur after conception, from unexpected medical risks to changes in family circumstances, which profoundly alter what it means to carry a pregnancy to term. In all these situations, women have expected that they will get to decide, perhaps in consultation with their families or doctors but free from state interference, whether to continue a pregnancy.”

The dissenters point out that Roe is sensitive to the potential life of the fetus and includes greater state involvement in the health care of pregnancies during the second and third trimesters where only a small fraction of abortions occur due to extreme circumstances. Almost 90% of all abortions occur in the first 12 weeks.

To allow a state to exert control over one of “the most intimate and personal choices” a woman may make is not only to affect the course of her life, monumental as those effects might be. It is to alter her “views of [herself]” and her understanding of her “place in society” as someone with the recognized dignity and authority to make these choices.

Understanding this path goes a long way to understanding what happened in Kansas. The enthusiasm of those opposing abortion led to stricter and stricter laws making abortion illegal and punishing those who provide medical services to women in health crisis. The logic that you don’t follow a rape with a murder led many legislators to forbid abortions in cases of rape and incest.

And by making all abortions illegal, all sorts of restrictions and consequences will follow. One anti-abortion “model template” for legislators to use notes that “To ensure that all parties participating in an illegal abortion are subject to enforcement, we recommend that the above criminal penalties for performing an illegal abortion should be extended to anyone, except for the pregnant woman, who (a) conspires to cause an illegal abortion or (b) aids or abets an illegal abortion.”

It defines aiding and abetting as including: “(1) giving instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortions or means to obtain an illegal abortion; (2) hosting or maintaining a website, or providing internet service, that encourages or facilitates efforts to obtain an illegal abortion; (3) offering or providing illegal ‘abortion doula’ services; and (4) providing referrals to an illegal abortion provider.”

You don’t have to be a shoemaker to know if the shoe fits. Removing abortion rights will lead to draconian abortion restrictions. Regardless of whether you are a Republican, Democratic or Independent or whether you are “pro-choice” or “pro-life,” you will recoil from giving the state such control over people’s private lives and personal decisions.

This is why most Americans intuitively support some form of Roe and why, in a post-Roe world, they will not support giving such control to the states and state legislators.

Robert Cavalier is the director of the [Program for Deliberative Democracy](#) at Carnegie Mellon University.

First Published in the Pittsburgh Post-Gazette on August 19, 2022, 12:00am